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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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09/809,468

03/15/2001

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180431-00015

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11/13/2009

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EXAMINER

DEAK, LESLIE R

ART UNIT

PAPER NUMBER

3761

MAIL DATE

DELIVERY MODE

11/13/2009

PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MICHAEL WHOLEY, MARK H. WHOLEY, and
PETRA WHOLEY

Appeal 2009-003982
Application 09/809,468
Technology Center 3700

Decided: November 13, 2009

Before ERIC GRIMES, RICHARD M. LEBOVITZ, and
STEPHEN WALSH, *Administrative Patent Judges*.

LEBOVITZ, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on the appeal by the patent applicants from the patent examiner's rejections of claims 1-7 under 35 U.S.C. § 103(a). Jurisdiction for this appeal is under 35 U.S.C. § 6(b). We reverse.

STATEMENT OF THE CASE

The claims are directed to an “apparatus for collecting blood clots, plaque, and other debris in arteries or veins” that comprises a filter assembly with paddles that have pores. According to the Specification, the apparatus is used to filter out thromboembolic debris from blood and to recirculate the filtered blood back into the bloodstream (Spec. 1:10-16).

Claims 1-11 are pending. Claims 8-11 are objected to as dependent on a rejected “base” claim, but the Examiner stated they “would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.” (Ans. 7.) Claims 1-7 stand rejected by the Examiner as follows:

Claims 1-5 under 35 U.S.C. § 103(a) as obvious over Hein (US 4,406,786, issued Sep. 27, 1983) and Stannard et al. (US 4,399,042, issued Aug. 16, 1983) (Ans. 3);

Claim 6 under 35 U.S.C. § 103(a) as obvious over Hein, Stannard, and Gelbfish (US 6,059,745, issued May 9, 2000) (Ans. 6); and

Claim 7 under 35 U.S.C. § 103(a) as obvious over Hein, Stannard, Gelbfish, and McGrath (US 6,416,665 B1, issued Jul. 9, 2002) (Ans. 7).

Claim 1, which is the only independent claim, is representative and reads as follows:

1. An apparatus for collecting blood clots, plaque, and other debris in arteries or veins, said apparatus comprising:
 - a filter assembly forming an elongated chamber;
 - a paddle assembly disposed in said chamber comprising at least one paddle having front and rear exterior surfaces defining a thickness of the paddle and pores extending through the thickness of the paddle from the front surface to the rear surface of the paddle;
 - a porous floor disposed within and extending across said chamber;
 - and

a means for coupling said filter assembly to an artery and/or to a vein.

OBVIOUSNESS OVER HEIN AND STANNARD

Claims 1-5 stand rejected under 35 U.S.C. § 103(a) as obvious over Hein and Stannard (Ans. 3).

Statement of the issue

The Examiner found that Hein described all the elements of the claimed filter apparatus, but not a paddle with “pores extending through the thickness of the paddle from the front surface to the rear surface of the paddle” as recited in claim 1. To meet this deficiency, the Examiner cited Stannard for its teaching of a paddle with holes and concluded that it would have been obvious to the ordinary skilled worker to have utilized it in Hein’s apparatus for the advantages taught by Stannard.

Appellants contend, inter alia, that the Examiner erred because the holes (160) (“pores” in claim 1) described in Stannard do not extend through the blade thickness from the front to rear exterior surfaces as required by claim 1.

The issue in this appeal is whether Appellants established that the Examiner erred in finding the “pore” limitation to have been met by Stannard.

Principles of Law

When determining whether a claim is obvious, an Examiner must make “a searching comparison of the claimed invention – including all its limitations – with the teaching of the prior art.” *In re Ochiai*, 71 F.3d 1565, 1572 (Fed. Cir. 1995).

Facts (“F”)

Scope and content of the prior art

The Hein patent

1. Hein describes a laboratory pressure filtering device (col. 1, ll. 5-13).
2. The filtering device has an elongated chamber 1, a magnetic stirring core 5 in freely movable form, filter 8 located at the floor of the device, and a filtrate discharge pipe fitting 7 (col. 3, ll. 22-23 & 61-66; col. 4, ll. 2-3 & 35-37; Fig. 1).

The Stannard patent

3. Stannard describes a filtering device with a rigid filter bed that includes a “blade means” mounted above the filter bed to filter portions of the filter cake that forms on the bed (col. 1, ll. 5-12; col. 2, ll. 51-56). Stannard states that its filter can be used for filtering waste water sludge or similar materials (*id.* at col. 1, ll. 8-10).
4. The blade means can be “a scraper blade that is fixed to and rotated by a vertical shaft concentric with the circular filter bed.” (Col. 2, ll. 56-60.)
5. The top surface of the blade is porous in certain embodiments and a vacuum is applied through the porous surface (col. 3, ll. 6-9).
6. Figure 3 shows a plan (top) view of a filter bed with a blade means (col. 3, ll. 23-24; col. 4, ll. 32-39).
7. Figure 5, reproduced below, shows a cross section of the blade means in Figure 3 (sectional view taken on the line 5-5 as shown in Fig. 3):

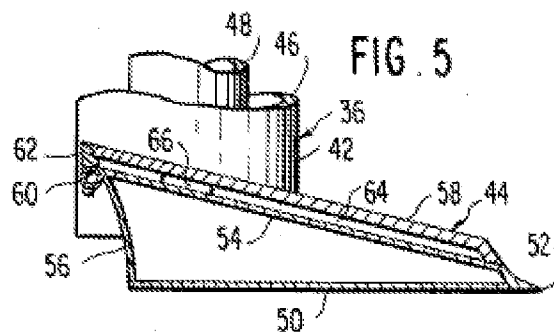


Fig. 5 is a cross section of a blade means (col. 3, ll. 27-28). The tip of the blade is labeled 52 and the rear of the blade is labeled 56.

The blade means 44 comprises a bottom web 50, pointed tip 52, upper web 54, rear web 56, porous cap 58, longitudinal tube 60 and lug element 62 which serves to hold the cap 58 spaced from the upper web 54 to provide space 64 beneath the cap 58. An opening 66 connects the space 64 with the interior of tube 46 so that a vacuum can be applied from a suction pump (not shown) to the space 64. This enables water or other liquid to be sucked through the porous cap 58 from fluid containing material that comes into contact with the upper surface of cap 58.

(Col. 4, ll. 40-50.)

8. As shown in Fig. 5, space 64, underneath the porous cap 58, runs lengthwise through the blade.

9. Figures 7-10 show “lateral, sectional” views of various types of scraper blades of the Stannard filter apparatus (col. 3, ll. 31-39).

10. Figure 10 is reproduced below:

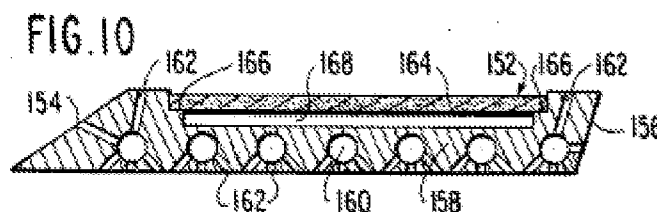


Fig. 10 shows “a lateral, sectional view of yet another form of scraper blade” (col. 3, ll. 38-39). “The scraper blade 152 of FIG. 10 comprises a pointed scraper end 154 and blunt trailing end 156 joined by a bottom web 158 which has horizontal holes 160 and transverse holes 162 drilled therein.” (Col. 6, ll. 15-18.)

11. In Fig. 10, the “porous plate 164 is carried on ledges 166 above the web 158” to create a space 168 (col. 6, ll. 18-20).

12. Fig. 10 is a cross-section view which is oriented in the same direction as the blade of Fig. 5, with the tip (52; 154) and rear (56; 156) ends defining the blade’s width.

13. Holes 160 of Fig. 10 are shown in cross-section and therefore run the length of the blade, not along the blade width or thickness.

Differences between the prior art and the claimed invention

14. Claim 1 is to an “apparatus for collecting blood clots, plaque, and other debris in arteries or veins.”

15. The apparatus comprises the following elements:

- “a filter assembly forming an elongated chamber”;
 - “a paddle assembly disposed in said chamber comprising at least one paddle having front and rear exterior surfaces defining a thickness of the paddle and pores extending through the thickness of the paddle from the front surface to the rear surface of the paddle”;
 - “a porous floor disposed within and extending across said chamber”;
- and
- “a means for coupling said filter assembly to an artery and/or to a vein.”

16. Appellants did not dispute the Examiner's findings that Hein's chamber 1, magnetic stirring core 5, filter 8, and pipe 7 (F2) meet the claimed limitations of the "elongated chamber," "paddle assembly," "porous floor," and "means for coupling," respectively (Ans. 3).

17. The Examiner found that Hein does not teach that its paddle assembly (magnetic stirring core 5) has "pores extending through the thickness of the paddle from the front surface to the rear surface of the paddle" as recited in claim 1 (Ans. 4).

18. The Examiner found that Stannard describes paddles ("scraper blade 152"; F6-8) that have front and rear surfaces, and pores ("porous plate 164" and "horizontal holes 160") that extend through these surfaces (Ans. 5), meeting the corresponding "paddle assembly" limitation of claim 1.

Analysis

Appellants contend that the Examiner erred in finding that Stannard describes "at least one paddle having front and rear exterior surfaces defining a thickness of the paddle and pores extending through the thickness of the paddle from the front surface to the rear surface of the paddle" as required by claim 1 (App. Br. 6-7). Pointing to Stannard's Figure 10, Appellants argue that the holes 160 do not extend from the front end 154 to the back end 156 of the blade and therefore do not extend through its "thickness" as required by the claim (*id.*).

Appellants' argument is supported by the facts. Figure 5 is a cross-section along 5-5 of the blade shown in Figure 3 (F6-7). The blade tip 52 and rear 56, located on the far-right and far-left, respectively, define the blade width or thickness. Figure 10 has the same orientation as in Figure 5 –

with the blade ends also on the far-right and far-left of the drawing (F12). Consequently, Figure 10 must depict a cross-sectional view of the blade with holes 160 running the blade length, not width (F13) as asserted by the Examiner.

In sum, the Examiner did not establish that Stannard teaches a paddle (blade) with “pores extending through the thickness of the paddle from the front surface to the rear surface of the paddle” as recited in claim 1. Instead, the pores or holes 160 in Stannard extend the blade length.

OBVIOUSNESS OVER HEIN, STANNARD, AND OTHERS

Claim 6 stands rejected under 35 U.S.C. § 103(a) as obvious over Hein, Stannard, and Gelbfish (Ans. 6).

Claim 7 stands rejected under 35 U.S.C. § 103(a) as obvious over Hein, Stannard, Gelbfish, and McGrath (Ans. 7).

Since neither Gelbfish nor McGrath were relied upon as describing “pores extending through the thickness of the paddle from the front surface to the rear surface of the paddle,” we conclude that these additional references do not remedy the deficiency stated for the combination of Hein and Stannard.

CONCLUSIONS OF LAW & SUMMARY

The Examiner erred in finding that Stannard teaches a blade with pores that extend through the thickness of the blade from the front surface to the rear surface. As not all limitations of claim 1-7 are met by the cited prior art references, we are compelled to reverse all the obviousness rejections.

REVERSED

cdc

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